FILE COPY

APR 5 1945
CHARLES ELMORE CROPLEY
CLERK

No. 971

In the Supreme Court of the United States

OCTOBER TERM, 1944

MAY DEPARTMENT STORES COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 971

MAY DEPARTMENT STORES COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

After the brief for the National Labor Relations Board in opposition in this case was filed, the opinions of the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Cowell Portland Cement Company*, decided March 6, 1945, and *National Labor Relations Board* v. *Whiting-Mead Co.*, decided March 28, 1945, came to our attention. These decisions in part bear upon question numbered two in the instant case (see Brief for the National Labor Relations Board in Opposition, pp. 3, 15–19).

In both the *Cowell* and the *Whiting-Mead* cases, the court sustained the Board's findings that the company had interfered with, restrained and co-

637873—45

erced employees in the exercise of rights guaranteed in Section 7 and had thereby engaged in unfair labor practices in direct violation of Section 8 (1) of the National Labor Relations Act (for the Board findings in this respect, see 40 N. L. R. B. 652, 672–673, and 45 N. L. R. B. 987, 1000, 1001). In the *Cowell* case the court also sustained the Board's findings that the company had violated Section 8 (3) and (5) of the Act, and in the *Whiting-Mead* case, that the company had violated Section 8 (2), (3), and (5).

In the *Cowell* case, the court nevertheless eliminated that provision of the Board's order which, like the order sustained by the court below in the instant case, required the company to refrain in any manner from infringing the rights guaranteed to employees under Section 7 of the Act. In so holding the court stated:

> Paragraph 1 (f) requires respondent to cease and desist from "In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act [29 U. S. C. A. § 157]." This, in effect, is a blanket order restraining respondent from

violating the statute [31] in any manner. We think such a blanket order unwarranted [32] and decline to enforce it.

[31] Sections 7 and 8 (1) of the Act, 29 U. S. C. A., §§ 157 and 158 (1).

[32] *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, 432–438; *National Labor Relations Board* v. *Walt Disney Productions*, 9 Cir., 146 F. 2d 44, 50.

In the *Whiting-Mead* case, however, the court issued a *per curiam* opinion directing enforcement of the broad 8 (1) provision of the Board's order. The opinion does not discuss the point even though it was briefed by both parties.

In the *Walt Disney* case (cited in the *Cowell* opinion), the court in its opinion had stated that it would refuse to enforce a broad 8 (1) order; however, the decree which was entered contained such a provision (Transcript of Record in *Walt Disney Productions* v. *National Labor Relations Board,* pending on petition for certiorari, No. 1021, this Term, p. 1393).[1] Moreover, the opinion in that case affords no precedent for the holding in the *Cowell* case because the court there reversed the Board's finding that the company had directly and independently violated Section 8 (1).

The inconsistency between the various decisions of the Circuit Court of Appeals for the Ninth

[1] We are informed, upon inquiry of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, that the inclusion of the broad 8 (1) provision in the *Disney* decree was the result of inadvertence.

Circuit seems to arise from a difference in the viewpoint of the various members of that court. As early as *National Labor Relations Board* v. *National Motor Bearing Company,* 105 F. 2d 652, decided prior to this Court's decision in the *Express Publishing Company* case, the various judges of that court expressed differences of viewpoint respecting the enforcement of broad orders (see, for instance, the dissent of Judge Haney in that case, 105 F. 2d at 663–665).

The Board has filed a petition for rehearing in the *Cowell* case directed solely to the court's refusal to enforce the broad 8 (1) order.

While the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Cowell* case in this respect is in conflict with that in the case at bar, the subsequent decision by the same court in the *Whiting-Mead* case would seem to remove the conflict. Moreover, we believe that the *Cowell* decision is erroneous under the principles established by this Court in the *Express Publishing* case. (The decision is also difficult to reconcile with the holding of the same court in *National Labor Relations Board* v. *Montgomery Ward & Company,* 133 F. 2d 676, cited in our brief in opposition, p. 18.) As presently advised, we do not believe the question has become sufficiently important to justify review at this time by the Court. For that reason, we remain of the opinion that the petition for a writ of certiorari in the

present case should be denied. If the Court should determine that certiorari should be granted in order to settle the matter, we respectfully urge that the writ be limited to the second question presented in our brief in opposition.

Petitioner's reply brief (p. 2) calls attention to the fact that the Board's main brief used the word "include" on pages 9–10 where the word should have been "exclude." Petitioner is correct in its statement, and we regret this typographical error.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
National Labor Relations Board.

APRIL 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945